No. 85-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF RIVERSIDE, *et al.*,

Petitioners,

v.

SANTOS RIVERA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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EDITOR'S NOTE

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Question Presented

Whether attorneys' fees properly calculated on the basis of reasonable hours and rates should be reduced solely on the basis of the size of the monetary recovery?

Table of Contents

Table of Authorities

Statutes:

Other Authorities:

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BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS[1]

The NAACP Legal Defense and Educational Fund, Inc. has been in the fore-

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[1] Letters consenting to the filing of this brief have been lodged with the Clerk of Court.

front of civil rights litigation for many years. As part of that effort we have had a long standing interest in the award of attorneys' fees adequate to ensure an appropriate level of private enforcement of the civil rights statutes. Thus, we have appeared as counsel or as amicus curiae in most of the leading civil rights attorneys' fees cases.[2]

In the present case, in addition to the interest of the Legal Defense Fund itself, we wish to present to the Court the interests and concerns of the private civil rights bar. The Legal Defense Fund, as are other organizations, is dependent on the continuing collaboration of private attorneys in bringing civil rights

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[2] E.g., Newman v. Piggie Pack Enterprise, Inc., 390 U.S. 400 (1968); Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983); Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974).

cases under 42 U.S.C. § 1983 and the various other civil rights statutes. Our nearly 200 cooperating attorneys are primarily single practitioners and attorneys in small firms. Unlike attorneys in large firms, they cannot depend on major commercial clients to support their pro bono activities. And, unlike lawyers who specialize in personal injury litigation, those who practice civil rights law cannot realistically depend upon a continuing flow of cases in which substantial fees may be taken from the recovery by the plaintiffs as an agreed upon percentage. To a very large degree, they depend upon the award of fees adequate to compensate them for the time actually expended on the cases they win.

It was precisely for these attorneys and their particular type of practice that Congress enacted the various fee statutes.

If the arguments of petitioners and their amici are accepted by this Court, these attorneys will, by and large, be driven out of the practice of civil rights law. The private enforcement of civil rights cases will be undermined and the enforcement of constitutional rights will be left almost exclusively to the pro bono efforts of a few large firms and to a few public interest organizations, which employ less than 100 attorneys altogether.[3]

We submit that such a result, however much desired by petitioners and their amici, would be totally contrary to the intent of Congress.

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[3] See "Counsel Fees In Public Interest Litigation," A Report by The Committee On Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 325 (1984).

SUMMARY OF ARGUMENT

I.

Civil rights cases, even those in which there is a monetary recovery, cannot simplisticly be equated to contingent fee tort litigation or other types of commercial practice. Because of the large public issues and difficult legal questions involved, civil rights cases often require a substantial investment in time. Yet recoveries are typically small and uncertain; delays in payment are commonplace, in part because of litigation tactics of government and defense attorneys. The adoption of a proportionality rule would, therefore, have a devastating effect on the ability of plaintiffs to bring these cases.

II.

Congress clearly did not intend that fees be calculated as a percentage of a monetary recovery. Repeated attempts to have the fees acts amended to include such a provision have been rejected by Congress. Therefore, the Court should not adopt the rule urged by petitioners and their amici.

ARGUMENT

I.

CALCULATING FEES AS A PERCENTAGE OF A MONETARY RECOVERY IS IMPROPER IN A CIVIL RIGHTS CASE

1. In an amicus brief filed earlier this term, we have described the nature of civil rights practice and why it cannot simplisticly be equated to ordinary commercial litigation. See Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., et al., in Evans

v. Jeff D., No. 84-1288, at 9-14. We respectfully refer the Court to that discussion. Similarly, the parallel sought to be drawn here by petitioners and their amici between contingent fee tort litigation and civil rights litigation is totally inapposite.

If civil rights litigation were like tort litigation, no fee statute would have been necessary. Negligence cases can be extraordinarily lucrative. The risk of losing a certain percentage of cases is made up by large fee recoveries in others. Further, the litigation of such cases is handled in the same manner as is other ordinary commercial litigation. Thus, both parties are represented by an established bar that seeks reasonable compromise and the speedy disposition of cases.

The reality of civil rights litigation is far different. Defendants' attorneys, particularly when they represent governmental agencies, do not see civil rights litigation as ordinary cases that should be handled in an ordinary fashion. To the contrary, often they take umbrage over the very fact that a lawsuit is filed. A common litigation tactic of defendant's counsel is to fight a case to the bitter end.[4]

Moreover, as discussed fully in respondents' brief, Congress was fully aware both of the drawn out and protracted nature of civil rights litigation as well as the overwhelming inequality of resources between plaintiffs and defendants. City, county, and United States Attorneys, attorneys general, and agency counsel, as well as the investigative and support

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[4] See op cite supra n.3, at 322-23.

staff of governmental agencies, are pitted against one or a handful of, at best, middle income plaintiffs and the few attorneys willing to take on such odds. The fact of the matter is that local and state governments are well equipped to protect their rights.

2. To the extent that public funds are unduly expended on fee awards, it has been our own experience that this is more often caused by the litigation tactics of government defense attorneys than by the actions of the plaintiffs. The present case provides a vivid example. It should have been settled early with a full apology to plaintiffs and a reasonable monetary settlement. Instead it was fought with public funds in an unsuccessful attempt to defend indefensible actions of police officers. As the Court of Appeals for the District of Columbia noted

in Copeland v. Marshall, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc), it is a government's right to defend a case in any way it chooses, but once it has decided to defend a case to the death, it may not then be heard to complain when it is faced with a reasonable attorney's fee caused by its own litigation tactics.

Even in cases where the defense has been reasonable, the nature of civil rights claims often results in extended litigation. Facts are often difficult to gather; for example, even the identity of the appropriate defendants may be unknown or difficult to ascertain, see, e.g., Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied sub nom. Employee-Officer John, No. 1765 Badge Number, 414 U.S. 1033 (1973), a matter rarely in dispute in ordinary tort litigation. Often, access both to the

vital information underlying the suit and to the plaintiffs themselves is controlled by the defendants. See, e.g., Ruiz v. Estelle, 550 F.2d 238, 239 (5th Cir. 1977) ("The record discloses that in response to their participation in this litigation, these inmates have been subjected . . . to threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders. . . ."). Moreover, uncertainties in the law, particularly regarding the liability of government agencies[5] and personnel acting in their official capacities,[6] may lead to multiple

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[5] See Monell v. Dept. of Social Services, 436 U.S. 658 (1978); Brandon v. Holt, ____ U.S. ____, 83 L.Ed.2d 878 (1985).

[6] See, e.g., Pulliam v. Allen, ____ U.S. ____, 80 L.Ed.2d 565 (1984); Butz v. Economou, 438 U.S. 478 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

appeals.[7] Under petitioner's rule all such work -- no matter how reasonable or necessary -- would, in effect, go uncompensated.

3. The inappropriateness of a proportionality rule also follows from the fact that, for a variety of reasons, the availability of monetary and even injunctive relief is limited in many civil rights cases. As long ago as Hague v. CIO, 307 U.S. 496 (1939), this Court recognized that tortious invasions of constitutional rights were, by their nature, difficult to measure in monetary terms. Under Carey v. Piphus, 435 U.S. 247 (1978), a plaintiff may only be able to obtain minimal or only nominal damages. At the same time, a plaintiff who has suffered a past injury may not have

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[7] For example, there were two appeals in Tennessee v. Garner, 471 U.S. ____, 85 L.Ed.2d 1 (1985), before the case reached this Court, and further proceedings will be required before judgment is entered.

standing to obtain injunctive relief if, as in this case, a repetition of the unconstitutional conduct is purely speculative. Los Angeles v. Lyons, 461 U.S. 95 (1983).

Congress was aware of these doctrines and their effect on the economic viability of civil rights litigation. Accordingly, it observed that

> While damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., at 9 (Sept. 15, 1976) (citing Wood v. Strickland, 420 U.S. 308 (1975);

Scheuer v. Rhodes, 416 U.S. 232 (1974); and Pierson v. Ray, 386 U.S. 547 (1967))[8] (footnote omitted; emphasis added).

But consider the result of a decision ignoring the implications of this legislative history and imposing a rule making fees proportional to the amount in damages. Inevitably, civil actions to redress certain types of constitutional violations will not be brought solely because they are unlikely to generate damage awards large enough in support a proportional fee award "adequate to attract competent counsel." S. Rep. No. 94-1011, 94th Cong., 2d Sess., at 8 (June 26, 1976); H.R. Rep. No. 94-1558 at 9. Not only will Congress's clearly expressed purpose be subverted, but also the

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[8] The report goes on to state that in a third class of cases, those in which "only injunctive relief is sought . . . prevailing plaintiffs should ordinarily recover their counsel fees." Id.

hope that damage suits can be a viable means to deter fourth amendment violations, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), will be frustrated; the only persons with a meaningful remedy will be criminal defendants.

The reality is plain. The Bill of Rights is not self-executing; without plaintiffs there will be no enforcement; without attorneys financially able to bring cases there will be no plaintiffs. The government's assertion that there are many attorneys who would take on these difficult and time-consuming cases in the expectation of a one-third fee from a $33,000 judgment is not only belied by the facts of this case -- there were no local attorneys willing to take it -- but can only be described as a fantasy. It certainly has no relation to the real

world of civil rights practice as the Legal Defense Fund and its cooperating attorneys experience it every day,[9] or as Congress viewed it when it considered and passed what is now § 1988.

4. The arguments of the petitioner and its amici, particularly those of the United States, are totally contrary to congressional intent and the decision of this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). The government advances a number of arguments that it now states would limit the proportionality rule to those cases where the only relief sought

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[9] The Equal Employment Opportunity Commission has an entirely different view than that of the Solicitor General concerning the impact of a proportionality rule on the private bar and the enforcement of the civil rights acts. Indeed, it urged that the United States support the position of respondents in this case. Its memorandum to the Solicitor General was printed in full in the Daily Labor Report of January 9, 1986 (BNA), at pp. E-1 to E-5. For the convenience of the Court, we have reproduced the memorandum on the appendix to this Brief.

or recovered is money damages in the nature of a tort recovery. But it is hard to see how or why the rule they seek can be so limited in the face of similarly worded and intentioned statutes. See New York Gaslight Club v. Carey, 447 U.S. 54, 70-71 n. 9 (1980). Thus, in individual Title VII actions, defendants will soon assert that fees should be limited to a proportion of the backpay recovery. Such a rule would, of course, be devastating to Title VII. Even for a case involving an upper level job, a recovery of backpay for a person denied a promotion is unlikely to exceed $20,000. Particularly when the defendant is a government employer (and we speak from 14 years of experience in litigating Title VII cases against the federal government), the achievement of that result may take hundreds, if not thousands, of attorney hours.

We, therefore, are able to state without qualification that a rule of proportionality would have the immediate and wholly predictable effect of driving from practice those attorneys who are responsible for providing representation to civil rights plaintiffs in the vast majority of civil rights and Title VII litigation --single practitioners and attorneys from small firms.[10]

II.

A PROPORTIONALITY RULE IS CONTRARY TO CLEAR CONGRESSIONAL INTENT

The respondents' brief sets out fully and interprets correctly the legislative history of the 1976 Fees Act. In addition, we wish to bring to the Court's

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[10] See Chambers and Goldstein, "Title VII at Twenty: The Continuing Challenge," 1 The Labor Lawyer 235, 255-58 (1985).

attention the fact that the federal government and state and local governments are now attempting to obtain from the Court through a restrictive interpretation of § 1988 what they have so far tried but failed to achieve in Congress. Indeed, so far they have been unable even to get a bill out of subcommittee despite five years of effort.

At least as far back as 1981, an effort was begun to convince Congress to amend drastically § 1988 and other fee acts as they affect government defendants. Many of the arguments made here -- the alleged burdens on the courts and on local governments, the purported multiplicity of frivolous law suits, the unidentified attorneys getting rich by "windfalls" -- were made to Congress. See Municipal Liability Under 42 U.S.C. § 1983: Hearings Before the Subcommittee on the Constitu-

tion of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1981), pp. 147-52 and 288-91 (Statement of National Institute of Municipal Law Officers); 524-558 (Statement of National Association of Attorneys General). Indeed, it was specifically recommended that the amount of fees be "incorporat[ed] ... into the amount being sought in damages." And that:

> If the case carves out a new area of civil rights law, or if the case will have a widespread impact, the prevailing party's attorney would be entitled to a larger fee than would be appropriate where the nature of the case is similar to a personal injury case, such as an injury suffered at the hands of a police officer. In the latter instance the judgment will be of little impact or interest beyond the parties directly involved and the fees awarded should be so limited.

Id. at 291. However, the proposed fee statute failed to be reported out of committee.

Efforts to have § 1988 amended escalated with the issuance of "Civil Rights Attorney's Fees Awards Act of 1976: A Report to Congress," by the National Association of Attorneys General. See The Legal Fee Equity Act; Hearing Before the Subcommittee on the Constitution of the Senate Judiciary Committee (98th Cong., 2d Sess, 1984), pp. 237-305. The Report urged that the Fees Act be amended specifically to prevent fees that were allegedly disproportionate to monetary awards. Given as an example of a case in which "the amount of fees awarded was grossly disproportionate to the degree of success on the merits" was this very case, Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982). Id. at 272-74.

This recommendation was incorporated into The Legal Fee Equity Act (S.2802, 98th Cong., 2d Sess. (1984)), which was drafted by the United States Department of Justice. Id. at 3. Section 6(b)(5) of the Act, which would have amended not only § 1988 but every other federal fees statute as it applies to federal, state and local governments, provided that fees will be reduced when:

> [T]he amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding.

Id. at 24-25. The section-by-section analysis states that the section is intended to deal with, for example, "cases where $100,000 is awarded in attorneys' fees for a $30,000 judgment." Id. at 124-125.

Again, the effort to amend the fees acts got nowhere and the bill died in subcommittee. The Legal Fee Equity Act was again introduced in the last session of Congress (S.1580, 99th Cong., 1st Sess. (1985)); see 131 Cong. Rec. S.10876 (daily ed. Aug. 1, 1985). To date, it has gone nowhere in either house.

Thus, Congress has refused, despite persistent attempts by a consortium representing all levels of government in this country, to amend § 1988 to incorporate the very rule urged by petitioners and their amici. As recently noted in Vasquez v. Hillery, ____ U.S. ____, 54 U.S.L.W. 4068, 4071-72 (January 14, 1986), the Court is properly loath to interpret a statute to accomplish what petitioners have repeatedly sought but failed to obtain in Congress. Accord Patsy v. Florida Bd. of Regents, 457 U.S. 496

(1982); see also Bob Jones University v. United States, 461 U.S. 574, 599-602 (1983). In light of the totality of its legislative history, the Fees Act cannot reasonably be read to mean that fees are to be limited to a percentage of a monetary award in civil rights cases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

Memorandum of the
EEOC to the Solicitor
General, Nov. 18, 1985.

EEOC Memorandum to Solicitor General Charles Fried

Nov. 18, 1985

MEMORANDUM

TO: CHARLES FRIED
Solicitor General
Department of Justice

FROM: JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission

SUBJECT: Recommendation for participation as amicus curiae in City of Riverside v. Rivera, cert. granted, 54 U.S.L.W. 3270 (Oct. 22, 1985) (No. 85-224).

The Equal Employment Opportunity Commission recommends participation in the above case as amicus curiae in support of respondents Rivera et al. (plaintiffs below). The brief for petitioner is due on December 5, 1985, and the brief for respondent is due on January 4, 1986.

Interest Of The Equal Employment Opportun-

ity Commission

This case presents the question of what are the appropriate standards governing an award of attorney's fees under 42 U.S.C. 1988 when the monetary amount recovered in damages for violations of constitutional and civil rights is less than the fees requested.[1] Resolution of this issue will affect substantially attorney's fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Section 1988 was expressly modeled on Title VII's fee provision, 42

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[1] As discussed infra, this issue was not expressly raised in the petition for certiorari. However, subsequent to the petition, Justice Rehnquist issued an opinion explaining his grant of a stay and indicating that the propriety of a fee award which is disproportionate to the amount of monetary relief is the central issue in the case. City of Riverside v. Rivera, 54 U.S.L.W. 3143 (Rehnquist, Circuit Justice) (on application for stay) (Sept. 10, 1985).

U.S.C. 2000e-5(k), and standards developed in §1988 cases are applied to Title VII. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983); S. Rep. No. 94-1011 (1976) at 4-6.

Because Title VII provides solely for equitable relief, monetary recovery is limited to amounts owed for back pay. Section 706(g), 42 U.S.C. 2000e-5(g).[2] Accordingly, the monetary recovery in an individual Title VII case may be relatively meager. Petitioners contend, and Justice Rehnquist's opinion on the stay application suggests he may agree, that an award of fees significantly larger than

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[2] The courts have held that compensatory and punitive damages are not available under Title VII. See Patzer v. Bd. of Regents of Univ. of Wisc., 763 F.2d 851, 854 n. 2 (7th Cir. 1985); Irby v. Sullivan, 737 F.2d 1419, 1423 (5th Cir. 1984); Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 (11th Cir. 1982), and cases cited therein.

the amount of damages awarded is per se unreasonable. (Reply br. at 2, 5; 54 U.S.L.W. 3143-44). However, in a Title VII case a rule restricting the award of attorney's fees solely because the dollar amount of damages is low could result in less than full relief for identified individual victims of discrimination who successfully bring suit. It would also discourage private attorneys from taking Title VII cases which involve only individual claims. These results are contrary to Congress's intent that aggrieved individuals, serving as "private attorney[s] general," complement the Commission's enforcement efforts. See Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 416-17 (1978), quoting, Newman v. Piggie Park Enterprises, 390 U.S. 400,

402 (1968). They are also inconsistent with the Equal Employment Opportunity Commission's recently stated policy that nothing less than "prompt, comprehensive and complete relief for all individuals directly affected by [employment discrimination]" is satisfactory. (See EEOC Statement on Remedies and Relief For Individual Cases of Unlawful Discrimination, Feb. 5, 1985, copy attached). Accordingly, we believe that it is important that our views be presented to the Court.

Background[3]

This suit arose from the violent breakup of a party at the home of Santos and Jennie Rivera by members of the police force of Riverside, California.[4] The Riveras and their guests, who were all of Mexican descent, claimed that the warrantless break-in of their house, accompanied by massive amounts of tear gas, verbal abuse and, in some instances, severe physical abuse, violated their First, Fourth, Fifth and Fourteenth Amendment

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[3] We base our statement on the opinions attached to the petition for certiorari, the complaint, and the pretrial order filed in district court. We have not reviewed the rest of the record in this case.

[4] Five persons, all plaintiffs herein, were arrested. Charges against one, Santos Rivera, were dropped by the police department prior to the filing of a complaint. Charges against the other four were dismissed by the municipal court upon an explicit finding of no probable cause.

rights, as well as their rights under the Civil Rights Act of 1870, 42 U.S.C. 1981, 1983, 1986.

Plaintiffs initially named thirty members of the Riverside police department as defendants, as well as the chief of police and the city itself. At an early stage of the proceedings, summary judgment as to seventeen of the police officers was granted on the ground that they merely had been present at the arrest scene and were not personally responsible for the constitutional and other deprivations. (Pet. App. 8-1).

The litigation continued for a period of five years, culminating in a favorable jury award for all eight plaintiffs against six of the individually named remaining defendants and the City of Riverside. Total monetary damages awarded

equalled $33,350.[5] (Pet. App. 6-1). The liability determinations have never been contested by the city or any other defendant.

The district court entered an award of $245,456.25 as attorney's fees and costs for the preceding five years of litigation. (Pet. App. 6-1). The court awarded plaintiffs' attorneys essentially all the hours requested, disallowing certain costs as impermissible under §1988. The court based its decision on

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[5] Although plaintiffs initially requested injunctive and declaratory relief, those requests were not pursued at trial. As explained by respondents Rivera et al. in their opposition to the petition for certiorari, injunctive relief was not requested as an injunction ordering the police to obey the law was superfluous. (Resp. Opp. at 3 n. 3). The district court, however, indicated that had such an "obey the law" injunction been sought, it would have been granted based on the severity of the constitutional violations by some of the officers. (See Opp. Cert. App. A-1 - A-2).

findings that, inter alia, the "action presented complex issues of law in a case involving eight individual plaintiffs, eleven individual defendants and a municipal defendant" (Pet. App. 6-2); "[g]iven the nature of this lawsuit, many attorneys . . . would have been reluctant to institute this action" (Ibid.); and "[p]laintiffs maintained this civil action in order to secure the vindication of important constitutional rights." (Id. at 6-5).

The court of appeals upheld the award. (Pet. App. 5-1). It refused to reduce the award because of the unnecessful[sic] claims, concluding that they were related to the successful claims. (Id. at 5-9). The court also rejected defendants'

contention that the amount of attorney's fees award must be proportionate to the jury verdict. (Id. at 5-11 - 5-13).

Thereafter, a petition for writ of certiorari was granted, and the fees judgment was vacated and remanded for further proceedings in light of Hensley v. Eckerhart, 461 U.S. 424 (1983). (Pet. App. 4-1).

After a subsequent hearing and briefing, and after reconsidering the record, the district court affirmed the original fee award. (Pet. App. 2-1). The court found that the relatively small size of the damage award resulted from "(a) the general reluctance of jurors to make large awards against police officers, and (b)

the dignified restraint which the plaintiffs exercised in describing their injuries to the jury." (Id. at 2-5).[6] The court refused to reduce the award because of the unsuccessful claims, finding that plaintiffs were successful on the "central and most important issue . . . [of] whether there was police misconduct;" "all claims . . . were based on a common core of facts;" and "[t]he

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[6] At the hearing, the district court elaborated on this point, stating:

> I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete. (Resp. App. B-5).

claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail" and "cannot reasonably be separated. . . ." (Id. at 2-6).[7] The court found that the amount of time expended by counsel "reflected sound legal judgment" and was reasonable because "[c]ounsel for plaintiffs achieved excellent results . . . ." (Id. at 2-7 -2-8). The district court stated that it was

> shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicanos community in the area where the incident occurred. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to

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[7] The court noted that given the conflicting testimony about the roles of individual police officers, "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants." (Pet. App. 2-4).

> serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights.

(Id. at 2-8 - 2-9).

The court of appeals affirmed, finding that the district court had correctly reconsidered the case in light of Hensley and that the fee award was within the district court's discretion. (Pet. App. 1-4). The court held that the record supports the district court's findings that all the claims involved common facts and related legal theories. (Id. at 1-6). According to the court of appeals, the district court followed Hensley's precepts by focusing on "the degree of success in relation to the ultimate award of fees and [finding] a reasonable relationship between the extent

of that success and the amount of the award." (Id. at 1-7). The court of appeals again rejected "the proposition that there need be a relationship between the amount of damages . . . and the amount of attorney's fees . . . ." (Id. at 1-8 -1-9).

On August 9, 1985, defendants filed a petition for a writ of certiorari, presenting the question "[w]hat are the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under Section 1988 . . . ." Petitioners contended generally that the district court abused its discretion and disregarded Hensley by failing to reduce the fee award. (Pet. 29-37). Petitioners challenged a number of specific aspects of the fee award, primarily the court's

failure to reduce the hours allotted for seven items. (Pet. 40-46). Petitioners also argued that counsel for plaintiffs' time records were inadequate. (Pet. 49-58).[8]

On August 28, 1985, Justice Rehnquist issued his opinion on the stay application, discussing solely the "significant question [presented in this case] involving the construction of §1988: should a court, in determining the amount of 'reasonable attorney's fee' under the statute, consider the amount of monetary damages. . . ." 54 U.S.L.W. at 3143.[9] In

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[8] The petition only obliquely refers to the district court's decision not to reduce the fees to account for unsuccessful claims. See, e.g., Pet. at 35, 54.

[9] Justice Rehnquist noted that the issue framed by petitioners "is not a model of specificity, [but] it does 'fairly subsume,' inter alia, the disproportionality issue." 54 U.S.L.W. at 3143.

his view, "the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as 'reasonable.' "Id. at 3144. After noting a split in the circuits on the issue,[10] Justice Rehnquist found that "[n]either Hensley nor Blum . . . addressed whether disproportionately between the amount of the monetary judgment obtained and the

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10 Justice Rehnquist contrasted DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985), and Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), which held that the size of the award alone does not warrant reduction of a fee, with Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), which held that the amount of the recovery may indicate the reasonableness of the time spent. 54 U.S.L.W. 3144. He failed to cite a later Seventh Circuit decision, Lynch v. City of Milwaukee, 747 F.2d 423 (7th Cir. 1984), which held that an award of nominal damages does not warrant reduction of the fee award where the plaintiff primarily sought nonmonetary relief.

amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee." Ibid. (emphasis added). He concluded that, except in cases involving primarily injunctive relief or defendants' bad faith conduct, "the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure." Ibid. Justice Rehnquist held that the probability of petitioners' success on this issue was sufficiently great to warrant a stay.

After the issuance of Justice Rehnquist's opinion, the disproportionality issue was briefed by respondents in their opposition to the petition and was the focus of petitioners' reply brief.

Discussion[11]

It is our position that the size of the damage award, standing alone, does not justify reduction of the attorney's fees award for counsel time otherwise reasonably expended on successful claims. This is not to say, however, that the amount of monetary relief is irrelevant. The Supreme Court held in Hensley v. Eckerhart, 461 U.S. 424, 436 (1983), that "the most critical factor [in setting a fee award] is the degree of success

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[11] We will discuss the legal issue of whether an award of attorney's fees must be in proportion to the monetary relief awarded. The petition also raises numerous factual issues regarding the reasonableness of the hours expended by plaintiffs' counsel. We take no position on these issues, the resolution of which depends on a review of the full record. However, in our view, the factual issues articulated by petitioners are not sufficiently significant to warrant briefing by the government, particularly inasmuch as the standard of review is abuse of discretion.

obtained." The amount of relief awarded is one consideration in determining plaintiff's level of success. However, the damage award can not be viewed in a vacuum or in absolute terms, as petitioners contend. See reply br. at 5. Rather, to measure success the amount of monetary relief awarded should be compared to the relief which is sought or could be reasonably expected if plaintiff were fully successful. This approach is consistent with the intent and purpose of the fee-shifting statute, the standards adopted in Hensley, and the near uniform view of the courts of appeals. Because the district court basically followed this approach, we recommend supporting respondents on this legal issue.

1. In the context of Title VII, the Supreme Court recognized in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978), that individual plaintiffs are the "chosen instrument[s] of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Quoting, Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). There are "strong equitable considerations" for granting plaintiffs fees, particularly because they are being "award[ed]. . . against a violator of federal law." 434 U.S. at 418. Thus, the legislative history of Title VII demonstrates that "one of Congress's primary purposes in enacting the section [providing attorney's fees to a prevailing party] was to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" 434 U.S.

at 420, quoting, 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey). Accord, New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980). The same policies underlie the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The Senate report found that "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. No. 94-1011 (1976) ("Senate Report") at 3. See also, e.g., Senate Report at 2 (enforcement of civil rights laws "depend[s] heavily upon private enforcement and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate . . . important Congressional policies"); H.R. Rep. No. 94-1558 (1976) at 1 ("House Report") ("effective enforce-

ment of Federal civil rights depends largely on the efforts of private citizens").

The standard suggested by Justice Rehnquist -- that attorney's hours otherwise reasonable and necessary to the litigation should not be fully compensated if their value exceeds the amount of damages recovered -- will necessarily cause attorneys to pursue less vigorously claims of low monetary value, such as those involving single individuals. This would defeat the purpose of the fee-shifting statutes to encourage full enforcement of civil rights laws. It would also frustrate Congress's intent to award fees "adequate to attract competent counsel, but which do not produce windfalls" (Senate Report at 6), inasmuch as compe-

tent attorneys will have less incentive to represent individual claimants who cannot finance their own litigation.

The legislative history of §1988 and other fee provisions demonstrate that the level of monetary recovery should not, of itself, dictate the amount of attorney's fees. For example, the Senate Report states: "It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report at 6 (emphasis added). See also 122 Cong. Rec. 31832 (September 22, 1976) (Remarks of Sen. Hathaway in support of bill which became §1988)("In the typical case . . . the citizen who must enforce the [civil

rights] provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee.") Similarly, the House Report recognized that not all civil rights litigation results in large damage awards, and that "in some cases immunity doctrines and special defenses . . . preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." House Report at 9.[12]

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[12] The legislative history's citation to three early attorney's fees cases is significant. In the Senate Report (at 6), Congress cited approvingly use of the Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), factors and gave as examples of their correct application three cases: Stanford Daily v. Zurcher,

2. Reduction of a fee award based solely on the amount of damages recovered is also inconsistent with the standards for assessing fees previously established by the Supreme Court. In Hensley v. Eckerhart, the Court clarified the means by which "adequate" fees are to be determined: initially, the "number of hours reasonably expended on the litigation [is] multiplied by a reasonable hourly rate." 461 U.S. at 433. This figure, sometimes called the "lodestar" (e.g. Copeland v. Marshall, 641 F.2d 880, 890-91 (D.C. cir. 1980) (en banc)), is then subject to further adjustment based,

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64 F.R.D. 680 (N.D. Ca. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Ca. 1974); and Swann v. Charlotte-Mecklenburg Bd. of Ed., 66 F.R.D. 683 (W.D.N.C. 1975). In none of those cases were large amounts of monetary damages awarded, if any, and, in the Stanford Daily case, no injunctive relief was ordered either.

among other things, on the "'results obtained.'" 461 U.S. at 434, quoting, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). However, the Court made it clear that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . ." 461 U.S. at 435. This holding forecloses any argument that a fully successful plaintiff should be awarded less than a fully compensatory fee solely because the amount of damages at issue was low.

Furthermore, as noted above, the Court directed that in setting fees the primary consideration should be on whether the "degree of success" justified the hours expended on the litigation. There

can be no question that where a significant aspect of the relief sought is monetary, the amount of the damages is relevant in measuring the degree of success. However, the Court's repeated use of terms such as "degree of success" (461 U.S. at 436), "extent of success" (id. at 438, 439 n. 14), and "level of success" (id. at 434, 439), indicate that the important comparison is between the relief sought and the relief obtained.

The Court in Hensley specifically rejected a "precise rule or formula" or a "mathematical approach" to determine attorneys' fees by comparing the number of successful claims to the total number of claims asserted. 461 U.S. at 436, 435 n. 11. As the Court remarked: "Such a ratio provides little aid in determining what is a reasonable fee in light of all relevant

factors." 461 U.S. at 435-36 n. 11. The Court also rejected a strict mathematical approach in Blum v. Stenson, ____ U.S. ___, 104 S.Ct. 1541, 1549-50 n. 16 (1984), holding that the numbers of persons benefitted is not a valid consideration in setting fees. The Court commented, "presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or indeed, in protecting the civil rights of a single individual." Ibid. For the same reason -- that counsel's diligence will not vary according to the amount involved -- a mathematical formula requiring that the fee award be in proportion to the damages is improper.

Justice Rehnquist suggests that any attorney using "billing judgment" would not bill more than the amount recovered.

54 U.S.L.W. at 3144. However, as the above cited legislative history reflects, the purpose of the civil rights fee-shifting provisions is to allow individuals to obtain redress for infringement of rights which cannot be valued in strict monetary terms.[13] See Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 460 (8th Cir.

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[13] Justice Rehnquist would not apply a mathematical formula to cases involving primarily injunctive or other nonpecuniary relief. 54 U.S.L.W. at 3144. However, the same rights are involved, and in some Title VII cases this distinction ma- little sense. For example, tw- duals may have identical cl- discrimination in thei- to promote them t- per year. C- and

1983) ("marketplace factors are often absent from civil rights litigation," because "it is difficult to place a pecuniary value on relief sought when the injury involves the infringement of the civil or constitutional rights of a plaintiff"). Furthermore, the "billing judgment" required of counsel is to "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." Hensley, 461 U.S. at 434. We find no support in Hensley or any other authority for excluding under the rubric of "billing judgment" compensation for necessary hours expended on a successful civil rights claim.[14]

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[14] The determination that the number of hours is "reasonable" necessarily includes a finding that there was a valid reason for the hours expended. For example, in an individual Title VII case, substantial attorney time may be required because of the complexity of the legal issues or because of defendant's tactics. If there

3. A look at the pertinent recent court of appeals' decisions reveal near uniform agreement that the size of the damage award is one relevant factor in assessing the amount of fees, but that there is no necessary proportional relationship between the amount of damages the amount of fees awarded. See Nephew v. City of Aurora, 766 F.2d 1464, 1467 (10th Cir. 1985); DiFilippo v. Morizio, 759 F.2d 231, 235-36 (2d Cir. 1985); Lynch v. City of Milwaukee, 747 F.2d 423, 428-29 & n. 5 (7th Cir. 1984); Wojtkowski v. Cade, 725 F.2d 127, 131 (1st Cir. 1984); Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 458, 461 (8th Cir. 1983); Perez v.

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is no valid explanation for the amount of work, it is not reasonable. In this case, the district court found that the hours were reasonably expended in view of the complexity of the case. (Pet. App. 2-2). Petitioner's real quarrel is with this determination, as their petition reflects.

University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979); Burt v. Abel, 585 F.2d 613, 618 (4th Cir. 1978); See also Bonner v. Coughlin, 657 F.2d 931, 934 (7th Cir. 1981).[15]

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[15] Justice Rehnquist cites two cases --DiFilippo v. Morizio and Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) --for the proposition that courts of appeals have held that the amount of damages received is not a permissible factor in awarding attorney's fees. DiFilippo, however, holds that comparison of damages to "typical . . . awards in the same type of case" is relevant. 759 F.2d at 236. While Ramos does state that fees should not be reduced because the recovery is small, the Tenth Circuit subsequently distinguished Ramos on the ground that only declaratory and injunctive relief had been requested. Nephew v. City of Aurora, 766 F.2d at 1465-66.

In Cunningham v. City of McKeesport, 753 F.2d 262, 268-69 (3rd Cir. 1985), pet. for cert. filed, 53 U.S.L.W. 3839 (May 14, 1985), also cited by Justice Rehnquist, the court of appeals held that it was incorrect for the district court to reduce the attorney's fee award by 50% on grounds not raised by defendants. The issue regarding the proportion of fees sought ($35,000) to damages awarded ($17,000) was discussed chiefly in a statement by Judge Adams dissenting from the denial of

Courts which have analyzed the issue in detail after Hensley have recognized that the amount of damages is appropriately considered as one measure of the level of success. See Nephew v. City of Aurora, 766 F.2d at 1466-67; DiFilippo v. Morizio, 759 F.2d at 231; Jaquette v. Black Hawk County, Iowa, 710 F.2d at 461. The relevant comparison is "whether the size of the award is commensurate with awards in [similar] cases generally, rather than whether the award viewed in some absolute terms is high or low." DiFilippo, 759 F.2d at 235. Another possible comparison is between the "remedy sought . . . and remedy obtained . . . ." Jaquette, 710 F.2d at 461. Where the comparison reveals that "plaintiffs won an unambiguous

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rehearing en banc.

victory . . . their attorneys should recover a fully compensatory fee." DiFilippo, 759 F.2d at 235.

4. The district court in this case correctly considered the size of the damage award in relation to the relief reasonably to be expected in this kind of case. The court found that the size of the award did not reflect limited success, but rather it resulted from a jury's general reluctance to make large awards against police officers and respondents' refusal to "play up" their "insulting and humiliating" injuries. (Pet. App. 2-5 -2-6). The court pointed out at the hearing that respondents were much more successful than the plaintiffs in several other civil rights cases, with which the court was familiar, involving police officers and cities. (Resp. App. B-5).

Accordingly, the court found that respondents had achieved "excellent results." (Pet. 2-7).

The district court can be criticized for not making more detailed findings and for relying solely on its own experience in determining that the results were better than those generally obtained in the same kind of case. Nevertheless, the court appropriately considered the size of the damage award as one relevant factor in determining the extent of success, and petitioners have pointed to nothing which indicates that the court's findings regarding the damage award were erroneous.

Accordingly, we recommend that a brief be filed in favor of respondents discussing the legal standards to be

applied to requests for attorney's fees greater than the amount of the monetary judgment.